



# GENERAL STATUTES COMMISSION

300 N. Salisbury Street, Suite 401  
Raleigh, NC 27603-5925  
Tel. 919-733-6660 Fax 919-715-5459

Floyd M. Lewis  
*Revisor of Statutes*

P. Bly Hall  
*Assistant Revisor of Statutes*

## MEMORANDUM

**To:** Senate Judiciary Committee  
**From:** General Statutes Commission  
**Re:** SB 568 (Nonademption of Specific Devises)  
**Date:** April 18, 2017

### General Comments

Generally, when real or personal property is specifically devised under a will and the property is no longer found in the estate of the testator at the time of the testator's death, the specific devise is adeemed—rendered ineffective.<sup>1</sup> If the property is simply not there, this result is logical. If, however, the testator died possessed of replacement or substitute property, ademption can lead to harsh or unjust results in cases where it is reasonably clear that, although not expressly addressed in the will, the testator intended the devisee to get the replacement property and did not intend to revoke the devise. In these cases, under the rules relating to ademption, the replacement or substitute property would pass to unintended beneficiaries under the residuary clause of the will or to unintended heirs by intestate succession. There is case law in this State that would prevent ademption in some situations, but there is nothing in the statutes.

This bill, which is based on Section 2-606 of the Uniform Probate Code, provides rules of construction that would apply to prevent ademption in certain situations and to allow inquiry into the testator's intent to determine whether the devise has adeemed.

This bill has the support of the Legislative Committee of the Estate Planning and Fiduciary Law Section of the North Carolina Bar Association.

### Specific Comments

**Section 1** adds new § 31-42.3 (Nonademption of specific devises; unpaid proceeds of sale, condemnation, or insurance; sale by conservator, guardian, or attorney-in-fact) to Article 7 of Chapter 31 of the General Statutes.

**Subsection (a)** of § 31-42.3 establishes that section as a default provision that controls the construction of a will when a devise would otherwise adeem.

**Subsection (b)** provides for nonademption of a specific devise if the following property is available:

- Any unpaid balance of the purchase price of specifically devised property owed by a purchaser at the testator's death. Current case law would adeem the devise.<sup>2</sup>
- Any unpaid amount of a condemnation award for the taking of specifically devised property during the testator's lifetime. This provision is consistent with case law.<sup>3</sup>

<sup>1</sup> *Tighe v. Michal*, 41 N.C. App. 15, 21-22, 254 S.E.2d 538, 543 (1979).

<sup>2</sup> *Green v. Green*, 231 N.C. 707, 709, 58 S.E.2d 722, 724 (1950).

<sup>3</sup> *Reading v. Dixon*, 10 N.C. App. 319, 321, 178 S.E.2d 322, 324 (1971).

- Any unpaid proceeds from fire or casualty insurance on or other recovery for injury to the specifically devised property. This provision is consistent with case law.<sup>4</sup>
- Any property owned by the testator at death that was acquired as a result of foreclosure, or obtained in lieu of foreclosure, of a security interest in a specifically devised obligation. Current case law would adeem the devise.<sup>5</sup>
- Any real or tangible personal property owned by the testator at death that the testator acquired as a replacement for the specifically devised property if it is established by clear, cogent, and convincing evidence that the property was acquired by the testator as a replacement for the specifically devised property. N.C. case law has not squarely addressed this issue.
- In other cases, an amount of money equal to the value of the specifically devised property but only to the extent that it is established by clear, cogent, and convincing evidence that ademption would be inconsistent with the testator's manifested plan of distribution or that the testator did not intend ademption of the devise. There is nothing comparable in current case law.<sup>6</sup>

**Subsection (c)** addresses the situation in which the testator becomes incapacitated or mentally incompetent after making a specific devise of real or personal property. If the property is sold or mortgaged by a conservator, guardian, or attorney-in-fact, or a condemnation award, insurance proceeds, or recovery for injury to the property is paid to one of these fiduciaries, the specific devisee is entitled to an amount of money equal to the net sale price, the amount of the unpaid loan, the condemnation award, the insurance proceeds, or the recovery. This provision is consistent with case law.<sup>7</sup>

**Subsection (d)** provides that the right of a specific devisee under subsection (c) is reduced by any right the devisee has under subsection (b).

**Subsection (e)** provides that subsection (c) does not apply if, after the sale, mortgage, condemnation, casualty, or recovery, the testator was found by a court to be no longer incapacitated or mentally incompetent and the testator lived for at least one year thereafter.

**Subsection (f)** provides that for subsection (c) to apply: (i) there does not need to be an actual adjudication of incapacity or mental incompetence before the testator's death, and (ii) the acts of an attorney-in-fact under a durable power of attorney are presumed to be for an incapacitated or mentally incompetent testator.

**Section 2** authorizes the printing of official and drafters comments.

**Section 3** provides that the bill becomes effective January 1, 2018, and applies to estates of decedents dying on or after that date.

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<sup>4</sup> *Id.*

<sup>5</sup> *Green*, 231 N.C. at 711, 58 S.E.2d at 725.

<sup>6</sup> *Tighe*, 41 N.C. App. at 21-22, 254 S.E.2d at 543.

<sup>7</sup> *Id.* at 23, 254 S.E.2d at 544; *Matter of Estate of Warren*, 81 N.C. App. 634, 638, 344 S.E.2d 795, 798 (1986).